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EMMANUEL YAW TEIKU

v.

PP

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FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
PAJAN SINGH GILL FCJ
RICHARD MALANJUM FCJ
[CRIMINAL APPEAL NO. 05-28-2003 (K)]

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16 MAY 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 515.7 grams of heroin - End of prosecution case - Whether proper test applied - Capsules containing heroin in stomach of accused -*

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Whether constituting actual possession - Whether raising presumption of trafficking - Whether knowledge could safely be inferred - Defence that accused swallowing capsules of gold dust - Whether not believable - Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

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The appellant was convicted of the offence of trafficking in 515.7 grams of heroin under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act') and was sentenced to death. The conviction was secured upon the argument of the prosecution that the 84 capsules containing the offensive drugs that the appellant had

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secreted out of his intestines some three days after his arrest constituted actual possession in law thereby triggering the application of s. 37(da) of the Act. Section 37(da) aside, it was the inference of the learned High Court judge that the appellant's reluctance to have his abdomen x-rayed showed his knowledge of

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the contents of the capsules. The appellant appealed against his conviction and sentence and upon the dismissal thereof, appealed further. In consequence, the following issues were raised before the apex court, namely: (i) whether the trial judge erred in applying the *prima facie* test at the end of the prosecution's case; (ii)

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whether the appellant's knowledge of the nature of the contents of the capsules *vis-à-vis* actual possession was proved; and (iii) whether the appellant's story that he was carrying the capsules on behalf of one Bright Owusu and thought that the contents were gold dusts had cast a reasonable doubt on the case of the prosecution.

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Held (affirming the Court of Appeal and the High Court) Per Richard Malanjum FCJ delivering the judgment of the court:

(1) The test applied by the trial judge was within the requirement of the Criminal Procedure Code as amended. As adverted to by the Court of Appeal, in using the terminology *'prima facie'*, it did not mean that the trial judge had evaluated the evidence of the prosecution less than the standard test of 'beyond reasonable doubt'. Indeed, it was clear that the learned judge, when concluding that the prosecution had established a *prima facie* case, had applied the stringent test of 'beyond reasonable doubt'. (paras. 6, 10)

(2) Proof of intention or knowledge is generally inferred from proved facts and circumstances. The dangerous drugs here were found in the stomach of the appellant and his conduct of initially refusing to undergo x-ray procedure should indicate his knowledge of what was inside his body. It follows that, as regards knowledge *vis-à-vis* actual possession, we would agree with the Court of Appeal that the trial judge had come to the right conclusion in concluding that the appellant knew and had knowledge of the contents of the capsules. Likewise, we would agree with the trial judge and the Court of Appeal in their observation that it was inconceivable that the appellant would have failed to realize the sheer weight difference between gold dust and the substance found inside the capsules. (paras 7, 15, 16)

[Conviction and sentence confirmed.]

Bahasa Malaysia *translation of headnotes*

Perayu disabit dengan kesalahan mengedar 515.7 gram heroin di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan telah dijatuhkan hukuman mati. Sabitan adalah diasaskan kepada hujah pendakwaan bahawa 84 kapsul yang mengandungi dadah terlarang tersebut yang keluar dari dubur perayu tiga hari selepas penangkapannya menunjukkan milikan sebenar sekaligus membangkitkan aplikasi s. 37(da) Akta. Apapun, menjadi inferens yang arif hakim Mahkamah Tinggi bahawa keengganan perayu untuk membenarkan bahagian perutnya di x-ray menunjukkan bahawa perayu mempunyai pengetahuan tentang kandungan kapsul-kapsul tersebut. Perayu merayu terhadap sabitan dan hukuman tetapi rayuannya telah ditolak. Perayu merayu seterusnya

dan persoalan yang berbangkit di hadapan mahkamah tertinggi adalah: (i) sama ada hakim bicara khilaf kerana memakai ujian *prima facie* di akhir kes pendakwaan; dan (ii) sama ada pengetahuan perayu berhubung sifat kandungan kapsul vis-à-vis milikan sebenar telah dibuktikan; dan (iii) sama ada cerita perayu bahawa ia membawa kapsul untuk seorang Bright Owusu dan percaya ianya mengandungi serbuk emas telah membangkitkan keraguan munasabah terhadap kes pendakwaan.

Diputuskan (mengesahkan keputusan Mahkamah Rayuan dan Mahkamah Tinggi)
Oleh Richard Malanjum HMP menyampaikan penghakiman mahkamah:

(1) Ujian yang dipakai hakim bicara adalah selaras dengan kehendak Kanun Prosedur Jenayah terpinda. Seperti yang dikatakan oleh Mahkamah Rayuan, penggunaan ungkapan *'prima facie'* tidaklah bermakna bahawa hakim bicara telah menilai keterangan berdasarkan kepada ujian yang lebih longgar dari ujian 'di luar keraguan munasabah'. Malah, adalah jelas bahawa yang arif hakim, dalam merumuskan bahawa pendakwaan telah membuktikan suatu kes *prima facie*, telah menggunapakai ujian ketat 'di luar keraguan munasabah'.

(2) Bukti tentang niat dan pengetahuan selalunya diandai dari fakta-fakta yang sudah terbukti. Dadah berbahaya di sini dijumpai di dalam perut perayu dan tindakan beliau menolak untuk di-x-ray pada awalnya harus menunjukkan pengetahuannya tentang apa yang ada di dalam badannya. Ianya mengikut bahawa, berhubung pengetahuan *vis-à-vis* milikan sebenar, kami bersetuju dengan Mahkamah Rayuan bahawa hakim bicara telah mencapai keputusan yang betul bilamana memutuskan bahawa perayu tahu dan mempunyai pengetahuan tentang kandungan kapsul. Begitu juga, kami bersetuju dengan hakim bicara dan Mahkamah Rayuan atas pandangan mereka bahawa adalah mustahil bahawa perayu tidak menyedari tentang perbezaan berat yang ketara di antara serbuk emas dan dadah yang dijumpai di dalam perutnya itu.

[Sabitan dan hukuman disahkan.]

Case(s) referred to:
Abdul Manap Mohamad Hassan v. PP [2003] 3 CLJ 641 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 99 ***(refd)***
Basil Omar v. PP [2002] 4 CLJ 418 CA ***(refd)***
Chan Pean Leon v. PP [1956] MLJ 237 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a)

For the appellant - Ponmugam Ponnan; M/s Ponmugam & Co
For the respondent - Noorin Bararuddin DPP

[Appeal from Court of Appeal; Criminal Appeal No: K-05037-01]

Reported by WA Sharif

JUDGMENT

Richard Malanjum FCJ:

[1] This is an appeal by the appellant against the decision of the Court of Appeal given on 5 September 2003 affirming his conviction and sentence of death by the High Court Alor Setar Kedah on a charge which reads:

> Bahawa kamu pada 13.12.1997 lebih kurang jam 11.30 pagi di Hospital Daerah Jitra, di dalam Daerah Jitra, di dalam negeri Kedah Darulaman, bagi pihak diri kamu sendiri telah mengedar dadah berbahaya iaitu 515.7 gram heroin dan ia merupakan satu kesalahan di bawah Seksyen 39B(1) (a) Akta Dadah Berbahaya 1952 (Akta 234 Semakan 1980) dan kamu boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] Briefly the facts of this case as found by the High Court are as follows:

> On the morning of 12 December 1997 at around 8am the appellant came to the inspection counter of the Customs Office at Bukit Kayu Hitam. Search was conducted on his belongings. Nothing was found. Bodily search was then conducted on him resulting in the finding of some Imodium and Mottilium pills from his trousers pocket. As a result of the finding the appellant was brought to the Jitra District Hospital for further search. At first the appellant was reluctant to be

A x-rayed on the ground of his health. With some explanations he later acceded. From the x-ray films of his abdomen several foreign objects were seen present in his large and small intestines. He was therefore placed in a special room and given laxative pills. On the third day the foreign objects were
B excreted. They consisted of 84 capsules suspected to contain heroin. These were sent to the Chemistry Department Penang for analysis. The result of the analysis confirmed that the contents of the capsules were heroin with the total weight of 515.7 grams. It was also confirmed by the Chemist who
C carried out the analysis that the heroin found came within the First Schedule of the Dangerous Drugs Act 1952 (the Act). Accordingly the appellant was charged for trafficking under s. 39B(1)(a) of the Act, tried and found guilty as per charge. He was sentenced to death, a mandatory sentence under the
D Act.

[3] During the trial at the court of first instance the prosecution adduced evidence of actual possession of the heroin by the appellant without resorting to the presumption under s. 37(d) of
E the Act. Thereafter the presumption of trafficking under s. 37(da) of the Act was invoked since the heroin found exceeded 15 grams. At the close of the prosecution's case the learned trial judge found that there was prima facie case made out against the appellant. He was therefore called to enter upon his defence.

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[4] Basically the defence raised by the appellant at the trial was his ignorance of the contents of those capsules. He testified that he was carrying the capsules on behalf of one Bright Owusu and he thought the contents were gold dust since he had done the
G same in two previous occasions albeit by different mode. The learned trial judge did not believe his version and at the end of the hearing and having considered the evidence adduced as a whole he was satisfied that the defence failed to raise any reasonable doubt and that the prosecution had proved its case
H beyond reasonable doubt thus finding the appellant guilty as charged.

[5] On appeal to the Court of Appeal several grounds were raised, *inter alia*, the failure by the learned trial judge to give reasons as to why a *prima facie* case as per charge had been made
I out against the appellant at the close of prosecution's case. It was also submitted that despite the amendment to the Criminal Procedure Code on the standard of proof required at the end of

prosecution's case, namely, on *prima facie* only, the test to be applied would be one of beyond reasonable doubt. Another argument advanced was that to constitute actual possession the prosecution must establish knowledge on the part of the appellant.

[6] The Court of Appeal was not persuaded by the arguments advanced on behalf of the appellant. On the issue of the test to be applied at the end of the prosecution's case the Court of Appeal said this:

> In using the terminology (i.e. *prima facie* as used in the Criminal Procedure Code (CPC) and applicable to this case being post-amendment of section 180 CPC) it does not mean the learned judge had evaluated the evidence of the prosecution less than the standard test of 'beyond reasonable doubt'. From the evidence made available in the record it is clear to us that the learned judge, when he concluded that the prosecution had established a *prima facie* case, had applied the stringent test of 'beyond reasonable doubt'.

[7] On the issue of knowledge of the appellant as to the contents of the capsules, the Court of Appeal said in its judgment:

> ... it is clear to us that knowledge of the appellant in respect of the 84 capsules containing the drug, could only be inferred from his behaviour and the surrounding circumstances as at the close of the prosecution's case. We see no reason why the learned trial judge in the present appeal should not make the necessary inferences as he had stated in the above passages. It is trite law that knowledge could not be seen but could be inferred from one's behaviour.
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> ...
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> We agreed with the learned trial judge that the reluctance of the appellant to have his abdomen x-rayed was because he knew of the contents of the capsules. It was obvious that the swallowing of 84 capsules could not be mistaken with the swallowing of medicines because of the large quantity of capsules swallowed. It is obvious to us that he was not forced to swallow those capsules. In our view, the appellant must have swallowed those capsules himself which show that he had handled the capsules himself. In our view, the learned judge came to the correct conclusion after evaluating the evidence that the appellant knew what were the contents in those capsules.

[8] In respect of the assertion by the appellant that the capsules belonged to one Bright Owusu of Cairo, the Court of Appeal did not interfere with the conclusion of the learned trial judge that it was just a fictitious character. The Court of Appeal was also of the view that the statement by the learned trial judge on the failure by the appellant to call the alleged Bright Owusu did not amount to making an adverse inference 'but to justify his conclusion that Bright Owusu was a fictitious character and did not exist'.

[9] Before us learned assigned counsel for the appellant marshaled two points, namely, that:

(i) the learned trial judge erred in applying the prima facie test at the end of the prosecution's case instead of the 'beyond reasonable' test after maximum evaluation of the evidence adduced by the prosecution at the close of its case; and

(ii) knowledge of the appellant as to the nature of the contents of the capsules *vis-à-vis* actual possession, was not proved.

[10] In respect of the first point we are inclined to agree with the learned deputy public prosecutor that the test applied by the learned trial judge was within the requirement of CPC as amended. We also agree with the reasoning given by the Court of Appeal as reproduced hereinabove. Indeed this point is now settled by the series of decisions of this court as well as the Court of Appeal. (See: *Balachandran v. Public Prosecutor* [2005] 1 CLJ 99; *Looi Kow Chai & Anor v. Public Prosecutor* [2003] 1 CLJ 734). We therefore find no merit on this first point.

[11] As regards knowledge *vis-à-vis* actual possession we have given it our anxious consideration. We are inclined to agree with the view expressed by the Court of Appeal as reproduced hereinabove.

[12] In fact on the subject of actual possession *vis-à-vis* the Act we need only to refer to some instructive cases. In *Tunde Apatira & Ors v. Public Prosecutor* [2001] 1 CLJ 381 this court had this to say:

> There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the learned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. The learned

trial judge found the appellants' version of how they had come to swallow the drugs in question as being implausible. The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the prescribed drug at the time of their initial detention. It follows that even if the learned trial judge and the learned judges of the Court of Appeal had directed themselves in accordance with the law as laid down by the court in *Muhammed bin Hassan* they would have arrived at the identical conclusion. To put it in another fashion, a reasonable tribunal arrived with the same facts and properly directing itself would have concluded that the appellants were found in actual possession of the heroin in question, that is to say, independently of the presumption in s. 37(d) of the Act. Since the quantity so found in the possession of appellants was several times greater than the statutory minimum of 15g, the court was entitled to conclude that they were trafficking in the said drug.

[13] Similar point was made by the Court of Appeal in *Abdul Manap bin Mohamad Hassan v. Public Prosecutor* [2003] 3 CLJ 641 with this statement:

Our observation of the above judgment makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption under s. 37(d) of the Act. If a trial judge invoke s. 37(d) of the Act to establish possession even though there was evidence of actual possession and then went on to invoke s. 37(da) to establish trafficking, it would be a serious misdirection. We would like to stress this point because time and again, DPPs in their submissions before us have requested this court to look into the totality of the evidence to establish actual possession even though the learned trial judges in their judgments invoked the presumptions under s. 37(d) to establish possession and s. 37(da) to establish trafficking. Following the decision of *Haryadi bin Dadeh v. PP* [2000] 3 AMR 3396, the Federal Court makes it very clear that even though there is evidence of actual possession on the part of an accused person, and despite that the learned judge invokes s. 37(d) to establish possession and then goes on to invoke the presumption under s. 37(da) to establish trafficking the learned judge had misdirected himself and in such a situation an accused person should be given the benefit of the doubt. The accused person should be found guilty of the offence of possession only.

[14] Hence, under the Act there is no mandatory rule to require for the invocation of s. 37(d) to establish the element of possession on a charge for trafficking of dangerous drug. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced. As to the nature or kind of evidence required to show knowledge it would depend on the facts and circumstances of each case. For instance in *Tunde Apatira & Ors (supra)* the drugs were found 'in packets within the stomachs of the appellants' and the version of the appellant was found to be implausible by the trial judge. This court agreed that 'the totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the proscribed drug at the time of their initial detention'. In another case of *Basil bin Omar v. Public Prosecutor* [2002] 4 CLJ 418 the Court of Appeal in answer to the issue of whether the accused had actual possession of the impugned drugs said this at pp. 422-423:

> On conduct of the accused, the evidence established the following:
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> (i) on sighting the roadblock, the accused told the taxi driver (PW4) to turn the taxi back to town;
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> (ii) the accused covered the bag with his jacket;
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> (iii) the accused tried to run away and on being stopped, the accused put up a struggle.
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> From the conduct and surrounding circumstances of the case, the irresistible inference is that the accused must have had knowledge of the impugned drugs inside the bag. On this issue, our finding is in the affirmative.

[15] Reverting to the present case the facts are similar to that of *Tunde Apatira & Ors (supra)*. The dangerous drugs were found in the stomach of the appellant. His conduct of initially refusing to undergo x-ray procedure should indicate his knowledge of what was inside his body. It should be borne in mind that proof of intention or knowledge is generally inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself. This difficulty had been acknowledged in the case of *Chan Pean Leon v. Public Prosecutor* [1956] MLJ 237 when Thomson J said this:

> Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

(See also: *Wong Nam Loi v. Public Prosecutor* [1998] 1 CLJ 37).

[16] We are also in agreement with the observation by the trial judge and the Court of Appeal in that it is inconceivable that the appellant would have failed to realize the sheer weight difference between gold dust and the substance found inside the capsules. The substance was in powdery form when the capsules were opened up. A half kilogram of gold dust would definitely be heavier than the same quantity of the powdery substance.

[17] Accordingly we are not persuaded that the learned trial judge and the Court of Appeal had erred in their analysis of the evidence adduced and the application of the relevant principles of law thereto.

[18] On the contrary we find no miscarriage of justice in the disposal of this case as to warrant our interference in the conclusion and verdict of the court below.

[19] This appeal is therefore dismissed and we affirm the conviction and sentence meted out by the learned trial judge upon the appellant.